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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of XIN WANG and
WEIHUA FENG.

XIN WANG,

Respondent,

v.

WEIHUA FENG,

Appellant.

D068610

(Super. Ct. No. D540541)

APPEAL from orders of the Superior Court of San Diego County, Keri G. Katz,
Judge. Affirmed.

Weihua Feng, in pro. per., for Appellant.

Buchalter Nemer, Robert M. Dato; Moore, Schulman & Moore and James P. Clark
for Respondent.

In this international move-away case, Weihua Feng (Mother), a Chinese citizen,
appeals two custody and visitation orders entered after she and Xin Wang's (Father)

American child (Child) relocated to China. Under the first appealed order, the court required her to permit Father to pick up their son in China for a trip to the United States (U.S.). Her violation of that visitation order and other court orders led to the second appealed order, which granted Father sole legal and physical custody over Child. Mother, in propria persona, contends the court erred by issuing orders that would harm Child's alleged Chinese citizenship, not relinquishing its jurisdiction over the case in favor of a Chinese court, and modifying custody over Child without considering his best interests. She also challenges the court's imposition of monetary sanctions against her. For reasons we will explain, the orders are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Court Enters Judgment on Child Custody and Visitation After a Trial on the Issues*

In July 2014, the court (Judge Parker) entered a judgment on child custody and visitation, based on evidence at trial concerning the circumstances of then-two-year-old Child who was born and lived continuously in California, Father's employment and residence in California, and Mother's residence in Shanghai, China. (*Wang v. Feng* (Nov. 23, 2015, D066772) [nonpub. opn., affirming judgment].) The judgment granted the parents joint legal custody over Child and set forth detailed provisions regarding physical custody and visitation.¹ Considering his best interests, the court decided Child was to reside primarily in China with Mother and have four, two-week visits per calendar year

¹ The judgment denoted itself a "final and permanent custody order within the meaning of *Montenegro v. Diaz* (2001) 26 Cal.4th 249 [*Montenegro*]."

with Father—two visits "in China" and two "in California." During Father's U.S. visitation time, the judgment allows him to travel with Child outside the Southern California area by providing Mother with 24-hours' notice. To "help ensure [Mother's] compliance with the child-sharing plan[,] the judgment includes her stipulation that the court would have "exclusive continuing jurisdiction to make future custody and visitation orders regarding the child, until further order of the Court" and Mother would register the court's custody and visitation orders with appropriate Chinese authorities.

B. *The Citizenship Dispute*

Soon after judgment was entered, disagreements over Child's citizenship status ensued. Neither parent disputed Child's American citizenship by birth, but Mother believed Child was also a Chinese citizen or able to receive the benefits of Chinese citizenship due to his parents being Chinese citizens. Mother informed the court that Child would eventually have to select the citizenship of only one country because China did not recognize "dual citizenship." Father believed any claim of Child being a Chinese citizen could serve as a renunciation of, or potentially impair, Child's American citizenship. In August 2014, the court issued an order that neither parent could take any action to interfere with or compromise Child's American citizenship, but either party could obtain Chinese legal documents to make his life easier in China (i.e., to travel or receive benefits).

C. *Mother Opposes U.S. Visitation After Child Relocates to China*

In late August 2014, Child relocated to Shanghai, China. Father successfully visited Child in China twice, and began attempting to make arrangements with Mother

for Child to visit the U.S. in February 2015. Father also wished to obtain copies of Child's passport and certain legal documents, the originals of which were in Mother's possession. Mother would not cooperate on making trip arrangements, prompting Father to file a request for order (RFO). In response to the RFO, Mother admitted her refusal to facilitate what she regarded as an "inappropriate" trip, stating she would allow an in-person visit in Shanghai instead and discussing reasons why it was not in Child's best interest to travel to the U.S. She further relayed a number of other disagreements she was having with Father, including his alleged failure to pay her child and spousal support. Mother declared she "voluntarily stipulated to [the] San Diego Court's jurisdiction at trial to show my respect towards this Court as well as the U.S legal system."

In April 2015, the family court (Judge Dorr) held a hearing on the RFO with both parties participating,² ordered Mother to provide copies of Child's passport and "Chinese travel documents" to Father, and confirmed the parents must abide by the existing custody and visitation orders, including the U.S. trip. The court ordered the parents to "meet and confer regarding [visit] dates," and if they could not agree, to file a RFO. In late April, Mother filed an unrelated RFO seeking to enforce Father's child and spousal support obligations to her.

Meanwhile, Father could not obtain Mother's agreement on visitation dates, causing him to file another RFO in May. He wished to obtain Child's passport and other travel documents, retrieve Child in China, complete the U.S. trip during two weeks in

² For this hearing and any subsequent hearings in which Mother participated, she appeared telephonically.

June, and sanction Mother for her failure to suggest any visitation dates in violation of Judge Dorr's order. Based on the exigency of accomplishing the trip in a timely manner to ensure Father's remaining visits in 2015 could occur, the court set an expedited hearing for June 8, 2015.

In Mother's response to the RFO, she maintained she would not facilitate a trip to the U.S. and the visits should occur in Shanghai where she believed Father was currently living and looking for work. She argued a U.S. trip did not make sense if Father was living in China, and the trip would be tiring for Child. Additionally, she refused to turn over Child's passport and travel documents because she believed Father would renounce Child's alleged Chinese citizenship.

In reply, Father pointed out that his right to visit with Child in the U.S. was not conditioned on where he lived at the time of planning or engaging in the visit, Child's relatives lived in various parts of the U.S., and Mother was not disputing "exact dates" for a visit, but rather, opposed *any* U.S. trip from happening.

In the interim of briefing on Father's RFO to obtain visitation dates, Mother filed an ex parte request for the court to "relinquish jurisdiction of custody and visitation and let [a] Shanghai Court take over," and sought to have the matter heard on an expedited basis before Father's RFO. Mother did not support the purported emergency nature of her request. In opposing her request to shorten time, Father stated Mother had previously stipulated to the court's exclusive jurisdiction on custody and visitation issues and the impetus for Mother's ex parte request appeared to be her current opposition to the

judgment and visitation orders. The court denied Mother's ex parte request to shorten time and set the forum selection matter to be heard in due course.

As to her request for an alternate forum, Mother principally argued that she, Child, and Father were presently living in Shanghai; Child no longer had a significant connection with San Diego; and a Shanghai court was a more convenient forum. She recounted Father's past statements about moving to China and looking for work there, yet acknowledged he had not established permanent residency in China.

D. *The Court Sets Specific Dates and Times for Child's U.S. Visit and for Mother to Provide Child's Documents to Father*

On June 8, the court (Judge Katz) held a hearing on Father's RFO regarding U.S. visitation, and both parties participated. In summary, the court reaffirmed the previous orders of Judges Parker and Dorr. It ordered Child's two-week visit with Father to begin specifically at 12:00 noon on June 29 and required Mother to provide him with Child's passport and documents in advance. In response to Mother's concerns that Father would somehow damage Child's legal status in China, the court admonished "father not to interfere with Chinese documents for child or cancel his Chinese citizenship or status." The court sanctioned Mother \$2,000 under Family Code section 271,³ but ordered the amount to be credited against any support payments Father owed her.

On June 16, the court granted Father's ex parte request for Mother to turn over Child's travel documents "on or before June 18, 2015, at 12:00 p.m." Mother did not

³ Subsequent unspecified statutory references are to the Family Code.

attend the hearing despite the court's finding that she had been properly notified of it.

She did not comply with the order.

E. *After Mother's Repeated Violations of Court Orders, the Court Grants Father Sole Legal and Physical Custody Over Child*

On June 29, Father filed an ex parte request to modify custody/visitation based on changed circumstances—Mother's failure to comply with the judgment and court orders including her failure to provide him with Child's legal documents and her refusal to turn over Child earlier that day for the ordered U.S. trip. His declaration substantiated these events. The court held a hearing the next day, and both parties participated. During the hearing, Mother admitted her noncompliance with the court's orders, stating that she had *intended* to turn over Child, but could not bring herself to do it because of her concerns over Child's citizenship status. She informed the court that she had initiated a Chinese case, which prohibited Child from leaving China. Father believed Mother would continue to violate the superior court's orders given the lack of enforcement mechanisms, he was trying to obtain assistance from the U.S. consulate to recover Child, and he needed a court order granting him sole legal and physical custody. The court granted Father's request on a temporary basis, reiterated orally that neither parent was to "renounce citizenship" for Child, and continued the hearing to July 14 to give Mother time to respond on the issue of modified custody and visitation.

On July 9, Mother filed her response to Father's RFO to modify custody. She repeated her previous reasons for objecting to a U.S. trip, and although she adduced no evidence that Child was a Chinese citizen, justified her noncompliance with the court's

orders based on her fear that Father would interfere with Child's alleged Chinese citizenship. She presented evidence that in the early July 2015 timeframe, a Shanghai court took jurisdiction to decide Child's custody and visitation. As a result of the pending Chinese case, Mother asserted that Child was prohibited from leaving Shanghai and she was unable to legally comply with the court's visitation orders. Finally, Mother argued it was in Child's best interest to remain in her care and custody.

On July 14, the court held a hearing on Father's request to modify custody and visitation, and Mother did not appear. During the hearing, the court discussed how she had failed to comply with court orders after being given "numerous opportunities" to comply, she had failed to turn over Child for his visit with Father, and it was in Child's "best interest . . . to spend time with his Father." Accordingly, the court granted sole legal and physical custody of Child to Father. After reviewing the proceedings and parties' declarations, the court imposed \$65,000 in sanctions against Mother for Father's attorney fees to enforce his visitation rights, stating "there's no doubt in my mind that Mother has intentionally frustrated settlement and has done everything to increase the cost of litigation when her duty is to decrease the cost of litigation."⁴

⁴ We do not recite or consider events occurring subsequent to the appealed orders. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 ["[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration."].) Mother's requests for judicial notice of subsequent facts, events, and court proceedings are denied. To the extent Mother submits evidence regarding alleged Father-Child visits, judicial notice of those documents is both inappropriate and unnecessary to our resolution of the issues on appeal.

DISCUSSION

A. *Standard of Review and Guiding Principles*

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

In addition, "[g]reat deference must be given to the trial court's adjudication of the facts" and balancing of factors in determining a child's best interests. (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549 (*Condon*).)

International move-away cases present "at least three concerns . . . different in kind from intrastate and even most interstate move-away cases"—a cultural problem, a distance problem, and most difficult, the jurisdictional problem. (*Condon, supra*, 62 Cal.App.4th at pp. 546-547.) In *Condon*, the court recognized that an order relocating a child to a faraway foreign country (e.g., Australia) could be tantamount to an order terminating the nonmoving parent's custody and visitation rights. (*Id.* at p. 547.) It was more troubled, however, by a California court's inability to guarantee that its custody and visitation arrangements would be honored in a foreign country. (*Id.* at p. 548.) The *Condon* court discussed possible methods for trial courts to alleviate the jurisdictional problem, such as relying on the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) and/or requiring the moving party to concede to

the California court's continuing jurisdiction over child custody matters, however noting that foreign courts may not enforce such concessions of jurisdiction. (*Id.* at pp. 557-558, 561-562.)

It is undisputed in this case that China does not subscribe to the Hague Convention.

B. *The Court Did Not Abuse Its Discretion by Ordering Father's Visitation in the U.S. and Entering a Modified Custody Order*

Mother appears to first argue that the June 2015 U.S. visitation order failed to include a provision protecting Child's putative Chinese citizenship and therefore, was not in Child's best interests.⁵ We conclude Mother has failed to demonstrate an abuse of the trial court's discretion. She did not establish Child to be a Chinese citizen, and the evidence showed he was an American citizen. The trial court was not required to sign a written order to protect Child's putative Chinese citizenship based solely on Mother's unsupported assertions or beliefs, and further, she did not sufficiently demonstrate such an order was necessary or in Child's best interest since Child was established to be an American citizen. Based on our review of the record, the court, in June 2015, primarily sought to implement the judgment by selecting specific dates for Child's U.S. trip while maintaining the status quo on Child's legal status. It orally admonished the parties not to interfere with Child's legal documents and citizenship status. Nothing more was required. Under the circumstances, the court could reasonably conclude that setting the U.S. trip, and allowing Father to possess Child's travel documents, was in Child's best interest.

Second, Mother argues the court erred by not giving calendar priority to her request to transfer jurisdiction, over Father's RFO regarding visitation dates. Relatedly,

⁵ We strive to address the crux of Mother's arguments, but her brief is difficult to follow and the argument headings do not necessarily set forth coherent grounds for reversal.

she argues the court's scheduling and procedures deprived her of due process. We reject these arguments.

There was no jurisdictional conflict at the time of Mother's ex parte request in early June 2015, since the court had previously obtained Mother's stipulation to exclusive continuing jurisdiction based on Child's undisputed American citizenship and habitual residence in the U.S. Indeed, Mother conceded the court's jurisdiction several times and invoked the court's powers to enforce support payments. *Subsequently*, to avoid complying with the court's order to turn over Child, she initiated a Chinese case. Mother never challenged the validity of her prior stipulation; rather, she argued that another forum had become more convenient. Thus, the court properly heard Father's RFO on an expedited basis and set the forum selection matter to be heard in due course. The court had jurisdiction to issue the appealed orders.

Third, Mother argues the court erred by granting Father sole legal and physical custody over Child without considering his best interests. In her brief, she reargues facts that were submitted to the trial court or improperly references events occurring after the court's July 2015 order. Mother has not shown the court abused its discretion in modifying its original custody orders. "Frustration of visitation rights by the custodial parent is a proper ground for transfer of custody to the formerly noncustodial parent." (*In re Marriage of Wood* (1983) 141 Cal.App.3d 671, 682.) Furthermore, the "deliberate sabotage of visitation rights not only furnishes ground for modification, it is a significant factor bearing on the fitness of the custodial parent." (*Moffat v. Moffat* (1980) 27 Cal.3d 645, 652.)

Here, Father established a significant change of circumstances by July 2015, namely, Mother's violation of various court orders that were designed to serve Child's best interests, her unabashed refusal to present Child despite clear orders to do so, and that she could effectively avoid the court's orders in China with little or no repercussions. (See *Montenegro, supra*, 26 Cal.4th at p. 256.) Substantial evidence supports that Mother did not intend to allow Child to visit Father in the U.S. and she deliberately sabotaged the trip by hiding Child and then initiating a Chinese case that prohibited him from leaving China. Accordingly, the court could reasonably conclude Mother no longer intended to abide by its orders, Father would be permanently deprived of his visitation rights, and it was in Child's best interest to maintain a relationship with him. (See *Condon, supra*, 62 Cal.App.4th at pp. 547-548 ["Unless the law of the country where the children are to move guarantees enforceability of custody and visitation orders issued by American courts, and there may be no such country, the court will be required to use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court."].)

Finally, Mother asserts various alleged violations of due process and that the court should have ordered mediation prior to modifying custody. We disagree. Mother had a full and fair opportunity to be heard prior to the court's modification of custody, and the record discloses no violations of due process. In addition, there were no contested factual issues to mediate and no possible prejudice from a lack of mediation. (See § 3170, subd. (a).) Mother admitted violating the court's visitation orders, and she chose to litigate the issue in Chinese court instead. The court did not abuse its discretion in

transferring sole legal and physical custody to Father to protect Child's relationship with him and ensure enforceability of its orders.

C. *The Court Did Not Abuse Its Discretion in Imposing Sanctions Against Mother*

Mother challenges the court's imposition of sanctions against her under section 271. She argues she did not intentionally frustrate settlement and the amount of sanctions was based on insufficient evidence.

Section 271 provides in pertinent part as follows: "(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

Section 271 " 'authorizes sanctions to advance the policy of promoting settlement of litigation and encouraging cooperation of the litigants' and 'does not require any actual injury.' [Citation.] Litigants who flout that policy by engaging in conduct that increases litigation costs are subject to imposition of attorney fees and costs" (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225.) Courts have imposed section 271 sanctions for delaying the resolution of child custody issues by taking unreasonable positions or making unsupported legal arguments. (E.g., *Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1178.)

We review a sanctions order under section 271 for abuse of discretion, reversing it "only if, considering all of the evidence viewed most favorably in its support and

indulging all reasonable inferences in its favor, no judge could reasonably make the order." (*In re Marriage of Corona*, *supra*, 172 Cal.App.4th at pp. 1225-1226; see *In re Marriage of Feldman* (2007)153 Cal.App.4th 1470, 1478.)

Applying the above principles, the court did not abuse its discretion by imposing sanctions under section 271. The judgment unequivocally granted Father two U.S. visits with Child every year regardless of where he was living at the time of the visit, and his permanent residence remained the U.S. Considering all of the evidence and proceedings by July 2015, the court could reasonably determine that, after relocating Child to China, Mother purposely delayed and frustrated Father's U.S. visitation rights, including failing to cooperate on travel plans, failing to offer visitation dates, refusing to allow Father to pick up Child in China on June 29, 2015, and initiating a Chinese court proceeding that barred Father from traveling with Child to the U.S. She also unreasonably withheld Child's legal documents. The court was authorized to impose sanctions.

As to the amount of sanctions, Mother argues she was improperly ordered to pay for all of Father's legal proceedings from July 2014 through June 2015, which totaled approximately \$120,000. She is incorrect. The ordered sanctions totaled \$67,000, based on Father's and his counsel's declarations regarding actually incurred attorney fees, counsel's estimate of the portion of fees expended to enforce Father's U.S. visitation rights and obtain Child's legal documents after judgment was entered, and the fact that Father still had not physically recovered Child and would incur more fees to do so. Contrary to Mother's assertion, the court did not order her to pay for any of Father's appellate attorney fees. Moreover, the court considered Mother's probable inability to

pay the sanctions out-of-pocket, ordered that sanctions could be used as an offset against monies owed her by Father except for child support arrearages, and she would still be able to support herself. Mother has not shown an abuse of the court's discretion.

DISPOSITION

The orders are affirmed. Respondent is entitled to his costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.